Supreme Court, U.S.

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No. 99-___ OFFICE OF THE CLERK

In The

Supreme Court of the United States

JEFFREY A. FRANKLIN,

Petitioner,

vs.

JERRY STAINER, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID A. NICKERSON
Attorney at Law
454 Las Gallinas Ave. Suite 183
San Rafael, CA 94903
Telephone: (415) 507-9097

Counsel of Record
Attorney for Petitioner
Jeffrey A. Franklin

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does the harmless error standard or a presumed prejudice standard apply when a court fails to conduct an adequate inquiry into a defendant's request to substitute counsel?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were Petitioner, Jeffrey Franklin, and Respondent, the State of California as represented by the Attorney General of the State of California.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND FACTS 2

A. Procedural History 2

B. Factual History 4

REASONS FOR GRANTING THE WRIT 5

A. Factual And Procedural Background 5

B. Franklin's Sixth Amendment Rights Were Clearly Violated 6

C. Harmless Error or Presumed Prejudice? 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante, 499 U.S. 279 (1991) 8

Atley v. Ault, 191 F.3d 865 (8th Cir. 1999) 7

Bland v. California Dep't. of Corrections, 20 F.3d 1469 (9th Cir. 1994) 7, 8

Brecht v. Abrahamson, 507 U.S. 619 (1993) 8

Hamilton v. Ford, 969 F.2d 1006 (11th Cir. 1992) 8

Holloway v. Arkansas, 435 U.S. 475 (1978) 6, 7, 8

Releford v. United States, 288 F.2d 298 (9th Cir. 1961) 7

Schell v. Witek, 181 F.3d 1094 (9th Cir. 1999) 9, 10

United States v. D'Amore, 56 F.3d 1202 (9th Cir. 1995) 7

United States v. Graham, 91 F.3d 213 (D.C. Cir. 1996) 9, 10

United States v. Morrison, 946 F.2d 484 (7th Cir. 1995) 9

United States v. Ray, 731 F.2d 1361 (9th Cir. 1984) ... 7, 8

United States v. Robinson, 913 F.2d 712 (9th Cir. 1990) 7

United States v. Salemo, 61 F.3d 214 (3rd Cir. 1995) 9

United States v. Torres-Rodriguez, 930 F.2d 1375 (9th Cir. 1991) 7, 8

United States v. Wilks, 46 F.3d 640 (7th Cir. 1995) 9

Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. section 1254 2

28 U.S.C. section 2253 2

28 U.S.C. section 2254 1

UNITED STATES CONSTITUTION

Sixth Amendment 2, 5, 6, 7, 10

OTHER AUTHORITY

Rule 10(a), Rules of the Supreme Court 10

PETITION FOR WRIT OF CERTIORARI

Jeffrey A. Franklin, the petitioner in the above-captioned case, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on July 24, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals was filed on July 24, 1998, and captioned as *Jeffrey A. Franklin v. Jerry Stainer, Warden; Attorney General of the State of California* (Ninth Circuit case numbers 96-56353 and 96-56359). The opinion was not published. A copy of that opinion appears herein as Appendix "A." On October 5, 1999, the Court of Appeals granted Franklin's motion to recall the mandate which had previously been entered by the court "for the limited purpose of considering his petition for panel rehearing and suggestion for rehearing *en banc*." The Court of Appeals then denied, in the same order, Franklin's petition for rehearing and suggestion for rehearing *en banc*. A copy of the order denying the petition for rehearing with suggestion for rehearing *en banc* appears herein as Appendix B.

JURISDICTION

The federal district court had jurisdiction over Petitioner's case pursuant to 28 U.S.C. section 2254. The Ninth Circuit Court of Appeals had jurisdiction over an

appeal from the final judgment of the district court pursuant to 28 U.S.C. section 2253. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE AND FACTS

A. Procedural History

Jeffrey A. Franklin, hereafter just Franklin, was convicted in 1982 in the Los Angeles County Superior Court of several offenses stemming from the robbery of a grocery store. Specifically, he was convicted of one count of first degree felony-murder, one count of robbery, and two counts of attempted robbery. In connection with the alleged felony-murder, Franklin was also charged with a special circumstance – that the murder occurred during the commission of a robbery. The prosecution's theory at trial was that Franklin aided and abetted the robbery of the market and was not the actual robber or killer. On appeal to the California Court of Appeal, both attempted murder counts and the special circumstance finding were reversed due to instructional error. However, the state court of appeal affirmed Franklin's first degree felony-murder and robbery convictions. At resentencing in the

Los Angeles County Superior Court, the State of California declined to further prosecute Franklin on any of the charges that had been reversed by the state court of appeals and in 1986 Franklin was re-sentenced to a term in state prison of twenty-seven years to life. He is currently in state prison serving that sentence.

On March 6, 1995, acting *in pro per*, Franklin filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. That petition was assigned case number CV-95-1358-HLH. On March 14, 1995, Franklin filed a second habeas corpus petition in the same district court. That petition was assigned case number CV-95-1577-HLH. Both petitions were assigned to United States District Court Judge Harry L. Hupp. On May 10, 1995, the district court consolidated the two petitions and thereafter they were treated as a single petition. On July 12, 1996, the district court entered a judgment dismissing the consolidated petitions with prejudice. On September 4, 1996, the district court denied Franklin's request for a certificate of probable cause to appeal.

On December 18, 1996, the Ninth Circuit Court of Appeals consolidated the two appeals taken from the dismissal of the consolidated petitions, but denied Franklin's request for a certificate of probable cause. However, on May 1, 1997, the Court of Appeals granted Franklin's motion for reconsideration and granted his motion for a certificate of probable cause. After briefs were filed by both parties, the Court of Appeals issued an unpublished opinion on July 24, 1998, affirming the district court's order dismissing the consolidated petitions.

On August 3, 1998, still acting *in pro per*, Franklin placed a timely petition for rehearing with suggestion for rehearing *en banc* in the state prison's mail system for mailing to the Court of Appeals. The petition for rehearing was never received by the court. However, on October 5, 1999, the Court of Appeals granted Franklin's motion to recall the mandate and permitted him to file his petition for rehearing with suggestion for rehearing *en banc*. In that same order, the court denied Franklin's petition for rehearing and rejected the request for *en banc* review.

B. Factual History

At approximately 2 p.m. on September 15, 1981, two men entered Frank's Market in Inglewood, California and stood in the line of customers at the liquor counter. When Kenneth Bolen, a market employee, reached for a bag of money beneath the cash register, one of the two men who had entered the market, later identified as Tyrone Richardson, stepped out of line and around the counter. Richardson grabbed the bag of money Bolen was holding. A struggle ensued between Bolen and Richardson. The struggle ended when Richardson fired a gun at Bolen, killing him. Richardson then ran from the market with the bag of money. The second man who had entered the market with Richardson, and who had remained on the customer side of the liquor counter, also fled. Several employees from the market chased the pair. Before entering a car to leave the scene, one of the men fired a shot from a rifle at the pursuing employees.

Police officers soon located the car at a nearby apartment building. In a trash bin near the car, police found a rifle and a jacket. The jacket contained Franklin's driver's license and other forms of identification. Franklin was detained by police near the apartment building, but not arrested. Some four months later, Franklin was identified in a line-up as the man who entered Frank's Market with Tyrone Richardson at the time of the robbery on September 15th.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to determine whether a harmless-error standard or a prejudice per se standard applies when a court violates a defendant's Sixth Amendment right to counsel by failing to conduct an inquiry into his request for the substitution of appointed counsel.

A. Factual And Procedural Background

As noted above, on July 11, 1986, the California Court of Appeals reversed Franklin's attempted murder convictions and set aside the special circumstance finding. It then remanded the case to the Los Angeles County Superior Court for further proceedings. Franklin appeared in the Superior Court on December 2, 1986 with appointed counsel John Cheroske. At that time the prosecution announced that it would not seek a retrial of the attempted murder charges or the special circumstance allegation. The Superior Court announced that it would order a new sentencing report and set the matter for re-

sentencing on the remaining offenses. Before the hearing ended, however, Franklin requested that the court appoint Russell Iungerich to represent him at any further proceedings. Iungerich was the attorney who had represented Franklin on appeal. Without conducting any inquiry into the reason for Franklin's request, or the nature of the conflict between Franklin and Cheroske, the court stated simply: "That request is denied."

In his habeas petition filed in the federal district court, Franklin claimed that the Superior Court had committed reversible error when it failed to conduct *any* inquiry into his conflict with Cheroske and why he was requesting that new counsel, already familiar with his case, be appointed to represent him. The federal district court, which adopted the findings of a magistrate, correctly concluded that "the trial court should have allowed Petitioner to explain the grounds for his request for a substitution of attorneys . . . " Nevertheless, the district court found no reversible error.

The Circuit Court of Appeals, in its memorandum opinion, glossed over the issue. It stated simply that no constitutional error had occurred. (Appendix A, pp. 2-3.)

B. Franklin's Sixth Amendment Rights Were Clearly Violated

Since at least *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978), it has been well established law that a trial court *must* conduct an "adequate inquiry" whenever it appears that a conflict exists between a defendant and court appointed counsel. A request for new counsel is evidence of a conflict. *Id.* Indeed, the Ninth Circuit itself has

expressly stated: "The State concedes that once a request for substitute counsel has occurred, inquiry is required." *Bland v. California Dep't. of Corrections*, 20 F.3d 1469, 1476 (9th Cir. 1994) citing *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1381 (9th Cir. 1991) and *United States v. Robinson*, 913 F.2d 712, 716 (9th Cir. 1990). See also *United States v. D'Amore*, 56 F.3d 1202 (9th Cir. 1995). Even more recently, the Eight Circuit noted in *Atley v. Ault*, 191 F.3d 865 (8th Cir. 1999): The trial court "improperly assumed answers to questions that were never asked and were necessary to its determination of whether the alleged conflict of interest required the substitution of new counsel."

There can be little question here that the Superior Court failed to make an "adequate inquiry" as required by *Holloway*. Indeed, it failed to make any inquiry at all. As soon as Franklin stated his request for new counsel, the court denied it without any inquiry or explanation. As a result, Franklin's Sixth Amendment right to counsel was clearly violated.

C. Harmless Error Or Presumed Prejudice?

The important question for this Court concerns the standard of review to be applied once a violation of a defendant's Sixth Amendment right to counsel is found. Traditionally, this Court and the various Courts of Appeal have held that a violation of even the qualified right to counsel of choice was prejudicial per se, requiring no showing of prejudice. *Bland v. California Dep't. of Correction, supra*, 20 F.3d at 1478, citing *Releford v. United States*, 288 F.2d 298, 302 (9th Cir. 1961); *United States v. Ray*, 731

F.2d 1361, 1365 (9th Cir. 1984); *United States v. Torres-Rodriguez, supra,* 930 F.2d at 1381. See also *Hamilton v. Ford,* 969 F.2d 1006, 1013 (11th Cir. 1992); *Wilson v. Mintzes,* 761 F.2d 275, 286 (6th Cir. 1985). Indeed, in *Holloway* itself, this Court stated that the harmless-error rule did not apply because a defendant's right to conflict-free assistance of counsel is too fundamental and absolute to permit courts to indulge in any calculation as to prejudice. *Holloway v. Arkansas, supra,* 435 U.S. at 488, 491.

However, in *Brecht v. Abrahamson,* 507 U.S. 619, 633-638 (1993), this Court held that in habeas cases a harmless-error standard applied to all errors that did not amount to "structural defects." For instance, a harmless-error standard would apply to errors that occur during the presentation of the case to the jury that may be quantitatively assessed in the context of the evidence presented. A structural defect, according to *Brecht,* is one which infects "the entire trial process." *Id.,* at 629-630. See also *Arizona v. Fulminante,* 499 U.S. 279, 309-310 (1991): Structural defects are those that affect "the framework within which the trial proceeds."

The question raised here, therefore, is whether the court's failure to conduct any inquiry into the conflict between Franklin and his attorney, which caused Franklin to request new counsel, was a structural defect or merely an error subject to the harmless-error standard. A number of courts which have addressed the question have ruled that the error at issue, the failure to conduct an adequate inquiry when a request for new counsel is made, is structural and that, as a result, *Brecht's* harmless-error standard does not apply. *Bland v. California Dep't. of Corrections, supra,* 20 F.3d at 1478 and cases cited therein.

The harmless-error standard has been found not to apply even if the right to counsel is violated only at sentencing. *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

On the other hand, some courts have held that the harmless-error standard does apply. *United States v. Graham*, 91 F.3d 213, 221-222 (D.C. Cir. 1996); *United States v. Wilks*, 46 F.3d 640, 644 (7th Cir. 1995); *United States v. Morrison*, 946 F.2d 484, 498-499 (7th Cir. 1991). Each of these cases adopt the reasoning set forth by the Ninth Circuit in *Schell v. Witek*, 181 F.3d 1094 (9th Cir. 1999), another case arising out of the Los Angeles County Superior Court. In *Schell*, the Ninth Circuit ruled that the harmless-error standard did apply to those defendants, like Franklin, who were represented by court appointed counsel. In *Schell*, like Franklin, the defendant "sought appointment of counsel to replace appointed counsel. There is no suggestion that Schell could or wanted to retain his own counsel. Consequently . . . the per se prejudice rule from *Bland* is inapplicable." *Id.*, at 1102. In other words, under *Schell*, when a court erroneously denies a substitution of counsel motion made by a defendant who can afford to retain counsel prejudice will be presumed and the judgment reversed. However, when a court erroneously denies a substitution of counsel motion made by a defendant who cannot afford to retain counsel and must have court appointed counsel, a harmless-error standard is applied and the judgment will only be reversed if the defendant can show prejudice. See also *United States v. Graham, supra*, 91 F.3d at 222: qualified constitutional right to counsel of choice does not apply to indigent defendant so denial of motion to substitute

appointed counsel requires showing of prejudice while non-indigent defendant need not show prejudice.

Clearly a split of authority exists. While the majority of courts have ruled that no prejudice need be shown when a defendant's qualified right to counsel of choice is violated, some courts are more recently holding that a harmless-error standard will be applied to those defendants which must accept court appointed lawyers due to their poverty. Without a doubt the Ninth Circuit applied the harmless-error standard of *Schell* and *Graham* to Franklin, an indigent defendant. Just as clearly, a presumed prejudice standard would have been applied had Franklin not had appointed counsel. When Franklin was unable to show prejudice, the court glossed over the trial court's total failure to conduct an inquiry into his motion to substitute counsel and dismissed Franklin's habeas petition.

This Court should grant *certiorari* in this case to resolve this clear split of authority among the federal court of appeals. Rule 10(a), *Rules Of The Supreme Court.* This Court should not permit the lower courts to develop a rule which applies one standard of review to indigent defendants and a different standard of review to wealthy defendants who are able to retain counsel. Such a rule makes a mockery of any concept of "equal justice under the law." Once *certiorari* is granted, this Court should adopt the majority rule that whenever a defendant's Sixth Amendment right to counsel is violated by a trial court's failure to conduct an inquiry pursuant to a defendant's motion to substitute counsel prejudice must be presumed and reversal mandated. Under that majority rule, the

Ninth Circuit erred when it affirmed the district court's dismissal of Franklin's habeas petitions.

CONCLUSION

For the foregoing reasons, the instant Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID A. NICKERSON
Attorney at Law
454 Las Gallinas Ave. Suite 183
San Rafael, California 94903

Attorney for Petitioner
Jeffrey A. Franklin

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY A. FRANKLIN, Petitioner-Appellant, v. JERRY STAINER, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	C.A. No. 96-56353 D.C. No. CV-95-01577-HLH
JEFFREY A. FRANKLIN, Petitioner-Appellant, v. JERRY STAINER, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	C.A. No. 96-56359 D.C. No. CV-95-01359-HLH **MEMORANDUM*** (Filed Jul. 24, 1998)

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Submitted July 20, 1998**

Before: HUG, Chief Circuit Judge, and SCHROEDER and KOZINSKI, Circuit Judges

Jeffrey Franklin appeals pro se the district court's dismissal of his consolidated habeas corpus petitions. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Franklin was convicted in state court in 1982 of four counts related to a robbery and shooting. On direct appeal, the California Court of Appeal reversed two of the counts because of inadequate jury instructions. The state of California has not sought to retry Franklin on the reversed counts; instead the trial court resentenced him in 1986 on the two remaining counts. Franklin is presently incarcerated to serve that sentence. In 1995, Franklin petitioned the federal district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He now appeals the district court's dismissal of his petition.

Franklin raises a variety of claims related to the two reversed charges, which the state has declined to pursue. None of these claims is cognizable in this habeas corpus petition because Franklin is not incarcerated based on these charges; neither does he face imminent incarceration based on them. *See* 28 U.S.C. § 2254(a) (Habeas petitioner must be "in custody pursuant to the judgment of a State court."); *Hensley v. Municipal Ct.*, 411 U.S. 345,

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** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); Ninth Cir. R. 34-4. Accordingly, Appellant's motion urging oral argument is DENIED.

351-52 (1973) (noting that the "in custody" requirement demands more than a "speculative possibility" of incarceration).

Franklin also claims violations of his Sixth Amendment right to counsel. Specifically, he argues that his trial and appellate counsel provided him ineffective assistance, and that the trial court at resentencing impinged his Sixth Amendment right by summarily denying his request for substitution of counsel. We agree with the district court, however, that Franklin's right to counsel was not impinged because substitution was unwarranted for the reasons Franklin cites. *See LeGrand v. Stewart*, 133 F.3d 1253, 1276 (9th Cir. 1998) (noting that denial of a substitution request is appropriate absent a showing of a complete breakdown in communication between attorney and client). Further, Franklin's ineffective assistance of counsel claims cannot succeed because they are essentially assertions that his attorneys should have raised meritless arguments on his behalf. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (requiring a showing of deficient performance as well as prejudice). Thus, the district court was well within its discretion in declining to order an evidentiary hearing or further discovery. *See Williams v. Calderon*, 52 F.3d 1465, 1484 (9th Cir. 1995) (concluding that the trial court correctly denied a hearing where petitioner made no colorable claim of ineffective assistance).

Finally, Franklin claims an infringement of his right to have a jury adjudicate the facts underlying his convictions. He contends that the appellate court's reversal of part of his conviction somehow rendered the trial evidence insufficient to support the remaining counts. This

contention is without merit, however: the reversal was based on jury instructions, not evidence. The appellate decision did not affect the evidence against Franklin, Franklin has not demonstrated any violation of his jury trial right, *see Pollard v. White*, 119 F.3d 1430, 1434-35 (9th Cir. 1997), and Franklin has failed to show that insufficient evidence supported his remaining convictions, *see Taylor v. Stainer*, 31 F.3d 907, 908-09 (9th Cir. 1994).

The district court's dismissal of Franklin's habeas corpus petition was correct and is, accordingly,

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jeffrey A. Franklin Petitioner-Appellant, v. JERRY STAINER, Warden, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	Nos. 96-56353 96-56359 DC# CV-95-01577-HLH Central District of California ORDER (Filed Oct. 5, 1999)

Before: HUG, Chief Judge, SCHROEDER, and KOZINSKI, Circuit Judges.

Appellant Franklin's motion to recall the mandate, entered July 2, 1999, is granted for the limited purpose of considering his petition for panel rehearing and suggestion for rehearing en banc, as attached to his motion.

The panel has voted to deny appellant's petition for panel rehearing.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is denied.

No further filings will be accepted in this closed appeal.